Supreme Court, U.S.
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No. 02-8286 (5)

IN THE SUPREME COURT OF THE UNITED STATES

DELMA BANKS, Jr.,
Petitioner,

-vs-

JANIE COCKRELL, Director,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

REPLY TO DIRECTOR'S OPPOSITION

An Execution Date Is Set For March 12, 2003.

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ARGUMENT

The Director urges the Court to turn Mr. Banks' petition away and allow his execution on March 12 because the petition presents no issue worthy of review. This view is mistaken. The fact remains that the panel below *reversed* the grant of relief on the two independent grounds ordered by the district court only by ignoring governing law from this Court, and refused to grant a Certificate of Appealability (herein COA) on two additional meritorious claims by conflating COA and merits review, just as the same court did in *Miller-el v. Cockrell*, No. 01-7662 (Feb. 25, 2003). Certiorari is appropriate in these circumstances.

Claim #1
Suppression of Key Penalty Phase Witness
Farr's Paid Informant Status

The Director asks the Court to deny review of this issue because the panel's overturning of relief is based upon the straightforward application of governing precedents and because it would have mattered little to the jury to learn that the State's key witness, Robert Farr, was a paid police informant. Each of these assertions is mistaken.

a. *If Mr. Banks Defaulted The Evidence That Shows This Claim to be Meritorious, He Shows Ample Cause*

The Director attempts to distinguish this case from *Strickler v. Greene*, 527 U.S. 263 (1999), by arguing that Mr. Banks could, or should, have been able to present his evidence in support of this claim in the habeas proceeding held in 1992 and 1993. While the Director is correct that Mr. Banks asserted the legal claim – he pleaded that, upon information and belief – the State had suppressed the fact that Robert Farr, its key penalty phase witness, was a paid informant and had set Mr. Banks up – he is mistaken in asserting that Mr. Banks defaulted federal review when he failed to present his supporting facts in that proceeding.

The record shows clearly that Mr. Banks made repeated attempts to discover whether Mr. Farr was a paid informant in this case. During a pretrial hearing, he asked the lead investigator to reveal the identity of the informant; the witness refused to do so. Pet. RE at Tab I at 24-25.[1] Prior to trial, the prosecutors assured counsel they would reveal all discoverable material without need for a formal motion. 1 SR at 13. They did not provide counsel with the name of the paid informant. During trial, counsel asked Mr. Farr before the jury if he was a paid informant. 9 SR at 2274. Farr denied that he was. *Id.* The prosecutors did not correct this misrepresentation, and in closing argument told the jury (and counsel) that Farr's testimony had been completely truthful. 10 SR at 2450.

Thus, in the trial proceedings, unlike in *Strickler* where there were no express representations concerning the later discovered impeachment materials, defense counsel here pointedly asked both the investigator and the witness to identify the informant in this case. The investigator refused to identify Farr as the informant, and Farr lied when he denied he was the informant. The prosecutors vouched for Farr's misrepresentation in their closing remarks. Given all of this, it was entirely reasonable for Mr. Banks and counsel to conclude that whomever the paid informant was, if there was one, it was *not* Robert Farr.

In state habeas proceedings, to make sure he did not waive any claim, Mr. Banks asserted, upon information and belief, that Farr was the informant. The attorney who filed the answer for the State was one of the two trial prosecutors. He was obliged to respond truthfully and accurately and

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[1] "R" refers to the original record on appeal, preceded by a volume number and followed by a page reference. "Pet. RE" refers to Petitioner's record excerpts. "Resp. RE" refers to Respondent's record excerpts. "Tr." refers to the transcript of the federal habeas hearing. "SHTr" refers to the transcript of the third habeas hearing.

confirm that, yes, Farr was, after all, the paid informant in this case. *See United States v. Messanatto*, 513 U.S. 196, 210 (1995). He did no such thing. He simply ignored the claim while providing detailed responses to each and every other claim pleaded in the petition. The state habeas court did not direct the State to respond to his claim, it refused to hold an evidentiary hearing where Mr. Banks could have subpoenaed the investigator and Farr and required them to testify, and denied the petition without addressing or acknowledging the claim. *See* App. E & D.

It stands comity on its head to assert, as the Director does, that, given all of this, it is Mr. Banks' fault that this claim, *and its supporting facts*, were not fully presented to the state courts prior to Mr. Banks seeking federal habeas relief. The Director makes no claim that Farr's paid informant status was not something the trial prosecutors were obliged to disclose; indeed, it was significant impeachment material. *See, e.g., Hoffa v. United States*, 385 U.S. 293 (1966).

The principal teaching of *Strickler* is that state habeas counsel's duty to investigate *Brady* claims is informed by the representations of the prosecutor. Here, the prosecutors had explicitly denied that Farr was a paid informant.[2]

Moreover, the record is clear that the witnesses whose testimony in the federal hearing below demonstrated the merit of this claim – Robert Farr, Deputy Sheriff Huff, and Assistant District Attorney Elliott – were not available to Mr. Banks before the federal hearing below. Farr's declaration is clear on this point. He stated that shortly after his testimony in Mr. Banks' trial, he was told by his law enforcement handlers that his safety was in jeopardy if he remained in the

[2] Thus, the two cases upon which the Director relies, *Gray v. Netherland*, 518 U.S. 152 (1996) and *McCleskey v. Zant*, 499 U.S. 467 (1991), are not on point as in both "the petitioner was previously aware of the factual basis for his claim but failed to raise it earlier." *See Strickler*, 527 U.S. at 287.

Texarkana area. Tr. Ex. B-1 at 2. He thus fled Texarkana, went first to Oklahoma and then to California to hide so he could not be found by those – like Mr. Banks – who he testified against. *Id.* He further said that he would not have spoken to anyone representing Mr. Banks until the fall of 1996, three and one years *after* the state habeas court rejected this claim.[3] *Id.* Deputy Huff was a hostile witness to Mr. Banks and revealed that he had paid Farr only when he was under oath at the hearing, and only after he was first assured by the magistrate judge that he could reveal that information. Tr. at 86. Finally, while counsel for Mr. Banks had some contact with Mr. Elliott during state habeas proceedings, Elliott never revealed that Farr was a paid informant.[4]

The record could not show more clearly that Mr. Banks wanted to litigate Mr. Farr's paid informant status in the trial court and again in the state post-conviction court, but at each turn was stymied by suppression, misrepresentation and silence. Had the panel below acknowledged *Strickler* and its teachings, it could never have reversed the district court's reasoned judgment that this claim *and* its supporting evidence were properly before the Court.

b. *The Director, like the Panel Below, Asks and Answers the Wrong Question Concerning Materiality*

The Director gamely argues that the suppression of Farr's informant status does not show a reasonable probability of a different sentencing result because Farr's penalty phase testimony was otherwise corroborated and he was impeached by other witnesses. These arguments miss the point because the important question is whether the missing "evidence could reasonably be taken to put

[3] In the district court, the Director made no effort to dispute these assertions and the court found them credible.

[4] The Director's assertion that Mr. Banks could have obtained this information if he had moved for discovery is also mistaken. Because of the States's suppression of evidence, Mr. Banks was denied the means to request such discovery on a good faith basis.

the whole case in a different light so as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995).

1. *Farr's Critical Testimony on Future Dangerousness Was Corroborated by No One*

The Director is correct that other witnesses testified to the facts, also supplied by Farr, that Farr, Mr. Banks, and another witness traveled to Dallas to obtain a weapon. That fact is entirely uncontroversial and was not in dispute. But Farr did provide the smoking gun for the prosecution's case for a capital sentence.

Farr told the jury that Mr. Banks' motive for going to Dallas was to secure a weapon. 10 SR at 2500-02. Farr testified that Banks sought a weapon so that he could (1) commit armed robberies, and (2) execute victims of those robberies, if necessary. *Id.* No other witness provided such testimony, and Mr. Banks denied such intent during this penalty phase testimony. 10 SR at 2566-69.

The importance of these assertions to the State's case for a capital sentence is found in the closing argument of the prosecution. When the prosecutor was explaining that a capital sentence could not be returned unless the jury unanimously found that Mr. Banks would likely commit other acts of violence in the future, he relied *solely* upon these assertions by Farr, and no other evidence. *Id.* at 2589.

Neither the Director nor the panel below acknowledges the central role this critical testimony played in the trial prosecutor's game plan to obtain a death verdict.

2. *The Other Forms of Impeachment Were Indirect and Pale In Comparison*

Finally, the Director asserts that because Farr was impeached with testimony that (1) he was a paid informant in another state, and (2) used fraud to obtain prescription drugs, acknowledgment

of his paid informant status in this case would have added little to reducing the jury's confidence in his credibility.

Neither of these impeachment grounds, if they were believed by the jury,[5] come within a country mile of establishing that Farr's involvement in this very proceeding was tainted by money and other inducements provided by the State. By suppressing Farr's paid informant status, the prosecutors were able to present Farr as an entirely disinterested witness.

Farr's testimony establishes beyond question that Mr. Banks' case for a life sentence was egregiously prejudiced by the suppression of Farr's true relationship with law enforcement in this case. It shows he set out to manipulate the younger Mr. Banks – for money and the promise that he himself would not be arrested on drug charges – and that his critical testimony about Mr. Banks' motive to obtain a gun – so that Mr. Banks could commit acts of violence in the future – had no basis in fact but was an invention by Farr.

What counts most when determining the likely effect of withheld evidence is not a barely plausible post-hoc explanation, but the prosecution game plan actually employed to persuade the jury to vote for a finding of future dangerousness. The record here leaves no doubt that the trial prosecutors viewed Mr. Farr's now recanted tale that Mr. Banks wished to obtain the gun to rob and kill others as their best evidence for a capital sentence.

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[5] The witness who testified that Farr was obtaining prescription drugs fraudulently, by his own admission, was drunk when he testified. *See* Tr. at 233. The witness who testified about Farr's informant status in Arkansas was shown to have a possible interest in going to work with the defense investigator in this case. 10 SR 2557-58. There is no assurance that the jury accepted, or placed much weight, on the testimony of either witness.

Claim #2
The Panel Below Never Considered In Its Entirety
The Mitigating Evidence Properly in The Record

The Director argues that even though the panel below reviewed the mitigating evidence in distinct groupings and never collectively, its decision reversing the grant of relief on this claim is faithful to *Williams v. Taylor*, 529 U.S. 362 (2000). Moreover, it argues that denial of relief is warranted because Mr. Banks' evidence is less compelling than that found in the *Williams* record. These views are misplaced.

This Court has made clear that when a reviewing court has before it a serious ineffective assistance claim – as this one is – analysis of the likely effect of counsel's errors and omissions requires a consideration of the entire record. Among other things, all the new mitigating evidence not presented to the jury must be placed against the State's case for a capital sentence, and the court must determine whether it is reasonably likely that if the jury heard the new evidence, it likely would have reached a different result. *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *Williams v. Taylor*, *supra* at 363. The panel failed to engage in that critical analysis, and instead weighed the mitigation in pieces against the record. The Director points to no place in the panel decision where it collectively weighed the evidence.

The Director also errs by focusing almost exclusively upon showing that Mr. Banks' mitigation is sufficiently less compelling than the mitigation offered in *Williams*. When all relevant factors are considered, it is clear that the district court properly found a meritorious claim.

First, with regard to the mitigating evidence, Mr. Banks proffered in the state court much of the evidence that he presented before the magistrate judge at the federal hearing. The state court held no hearing and made no findings. Because of this complete absence of findings, the district

court, following a long line of cases, properly granted an evidentiary hearing on this issue, heard from a number of witnesses, and granted relief based upon that record.[6] The panel below determined that only the evidence proffered in the state court was available and ruled that any "new" evidence was unexhausted and could not be considered.[7] Nevertheless, the proffered evidence alone presented substantial mitigating evidence, and is quite similar in character and kind to that in *Williams*. *See* Petition for Writ of Certiorari at 32.

The Director, like the panel, simply states that such evidence is insufficient to demonstrate the likelihood of a different result. But as the district court found, it was sufficient when considered against the other relevant record factors. Unlike the defendant in *Williams*, Mr. Banks had no prior convictions; Williams had a substantial history of violent criminal conduct. Moreover, the only evidence supporting future dangerousness aside from the crime – the testimony of penalty phase witnesses Vetrano Jefferson and Robert Farr – has been credibly recanted by those witnesses. And as this case is not governed by the AEDPA amendments, the district court could find relief was appropriate without also having to find that a state court decision to the contrary was objectively unreasonable, as was the case in *Williams*.

Unlike the panel and the Director, the only court that has properly reviewed this claim and its supporting evidence – the district court – found that Mr. Banks had established a meritorious Sixth Amendment claim. Certiorari is appropriate under these circumstances.

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[6] *Townsend v. Sain*, 372 U.S. 293 (1963); *Goodwin v. Johnson*, 132 F.3d 162, 183-84 (5th Cir. 1998).

[7] This ruling is inconsistent with this Court's construction of the exhaustion requirement. *See Vasquez v. Hillary*, 474 U.S. 254, at 257-58 (1986).

Claim #3
The Panel Plainly Erred By Holding That FRCP Rule 15(b)'s Application to Habeas Proceedings Is Not A Debatable Issue

In the district court below, Mr. Banks, with ample and repeated notice to the Director, demonstrated that the State's suppression of a lengthy pretrial statement involving its key guilt phase witness, Charles Cook, violated *Brady v. Maryland*, 373 U.S. 83 (1963) and progeny. The district court did not adjudicate the claim, and did not grant a COA on this issue. 5R at 1209-17. The panel denied a COA as well, concluding that jurists of reason would not find debatable the question whether Fed. R. Civ. Pro. 15 (b)'s amendment-by- implied-consent rule applies to habeas proceedings. App. A at 2.

The panel's conclusion that Mr. Banks was not entitled to a COA concerning this issue is contrary to *Miller-el v. Cockrell*, No. 02-7662 (Feb. 25, 2003). This issue, at the very least, is one jurists of reason would find debatable. Moreover, the record plainly shows that all the parties were on notice that the suppression of exculpatory and impeachment material concerning key State witness Charles Cook would be heard at the evidentiary hearing held in the district court.

a. *Miller-El Warrants a Grant of Certiorari As Rule 15(b)'s Application to Habeas Corpus Proceedings is Debatable by Jurists of Reason*

The Court has just made clear that a habeas petitioner is entitled to be heard on the merits of his claim if he can demonstrate that the claim is one that is debatable among jurists of reason. *Miller-El*, *supra*; *Slack v. McDaniel*, 529 U.S. 473 (2000). In *Miller-El*, the Court announced the showing necessary in the following terms:

> A prisoner seeking a COA must prove "'something more than the absence of frivolity'" or the existence of mere "good faith" on his or her part. *Barefoot*, supra, at 893. We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debated even though every jurist of reason might agree, after the COA had been granted and the case has received full consideration, that petitioner will not prevail.

Miller-El, slip op. at 13.

There can be little doubt that Rule 15(b)'s application to habeas proceedings is an issue that is reasonably debatable. Indeed, this Court has assumed in prior cases that the rule applies. *Withrow v. Williams*, 507 U.S. 680 (1993). For the reasons set forth in the petition for writ of certiorari, it is clear that Mr. Banks was entitled to COA on this issue and the panel erred in denying COA.

b. *The Underlying Brady Issue was "Tried" by Implied Consent*

The Director's argument that Mr. Banks did not raise this issue until post-hearing briefs is completely controverted by the record.

First, Mr. Banks alleged in his petition that the prosecutors had withheld impeaching evidence on its two critical witness, Cook and Farr. Mr. Banks alleged, as one of several due process violations committed by trial prosecutors, that the prosecutors "knowingly failed to turn over exculpatory evidence as required by *Brady v. Maryland*" concerning key State witnesses Charles Cook and Robert Farr. 1R at 46.

The Director plainly understood that Mr. Banks was asserting a claim that the State had withheld *Brady* material concerning both Cook and Farr. In its Answer, under the heading "The State did not suppress favorable, material evidence," the Director acknowledged that *Brady* imposed "an affirmative duty [upon the trial prosecutors] to disclose to the defense evidence that is both favorable to the accused and material to guilt or punishment," [and that] "such favorable evidence includes impeachment evidence." 1R at 108-109. More specifically, the Director understood precisely that Mr. Banks was alleging that the State suppressed at trial material impeachment

evidence concerning Charles Cook. "Banks contends that the State suppressed material impeachment evidence in connection with its witness Charles Cook." *Id.* at 207.

Thereafter, Mr. Banks conducted discovery and filed declarations from both Cook and Farr. Cook's declaration said, *inter alia*, that he had engaged in extensive discussions with law enforcement officials about his testimony shortly before trial. Largely because of this proffered evidence, the Magistrate Judge granted Mr. Banks limited discovery and ordered the production of records in the possession of the State that concerned, *inter alia*, interview notes, and all other written documentation concerning Charles Cook. *See* 3R at 698. In compliance with this order, the District Attorney disclosed, for the first time, portions of his file. One lengthy document contained therein was the seventy-four page transcript of a pretrial interview between law enforcement officials and Charles Cook. This document, later marked and introduced at the evidentiary hearing as Petitioner's Exhibit B-04, became one important piece of *evidence* to establish his *claim* that trial prosecutors deprived Mr. Banks of due process of law by suppressing material impeachment evidence concerning the State's key trial witness.

After these disclosures, and well in advance of the scheduled evidentiary hearing, the Magistrate Judge issued an order establishing the issues on which she would allow the parties to submit evidence. Magistrate Judge Malone understood that Mr. Banks wanted to present evidence on three issues, the first one being " whether Petitioner's Fourteenth Amendment rights were violated by the State withholding critical exculpatory and impeaching evidence concerning at least two important witnesses–Charles Cook and Robert Farr." 2R at 630. The Order restated the Director's position on this issue that no such hearing should take place because Banks "has had an adequate opportunity to develop the factual background in state court." *Id.* at 625. Importantly, the

Director made no objection of surprise–that Mr. Banks had expanded his due process claim–or that any portion of the claim was unexhausted. Thereafter, the Director provided notice that he would utilize this very exhibit to defend against the due process claim. *See* 3R at 689 ("to defend against the due process claim, the Director will submit as Petitioner's (sic) Exhibit 1, a copy of the entire investigative file of the Bowie County District Attorney's Office in the Banks case"), and indicated further that it would call Assistant DA Elliott and former Bowie County Deputy Sheriff Willie Huff "to defend against the due process claim." *Id.* The Cook statement was included in this file. Similarly, Banks made it very clear that he would use this same statement–Exhibit B-04–to establish his due process claim. 3R at 766.

At the evidentiary hearing, the claim that the prosecutors had suppressed important impeachment material as to Cook and Farr took center stage. Counsel for Banks made an opening statement in which he confirmed that he would prove, *inter alia*, that the trial prosecutors had unconstitutionally withheld impeachment evidence with regard to both Charles Cook and Robert Farr. Tr. at 8. Moreover, counsel for Mr. Banks examined prosecutor Elliott as to his understanding of the duty to disclose exculpatory and impeachment material, Tr. at 25-27, extensively examined Elliott about Cook's September statement, and had Elliott confirm that the document had *not* been disclosed at trial, Tr. at 43-47. On redirect, counsel returned to the issue and asked Elliott to review portions of the exhibit that showed a staff prosecutor coaching Cook how to answer questions concerning his April statement that made no sense. Tr. 64-68. On further redirect, Elliott was asked still more questions about inconsistencies between Cook's trial testimony and statements in Ex. B-04. Tr. 72-74. During the hearing, this exhibit was moved into evidence with no objection from the Director. Tr. at 75.

Given all of these circumstances, the Director is plainly mistaken to assert that this claim was not asserted in the petition and Mr. Banks' failure to formally amend his petition left the claim out of the case. Even if this claim was not sufficiently pleaded in the petition, Rule 15(b) of the Federal Rules of Civil Procedure provides: "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Moreover, "failure to so [actually] amend does not affect the result of the trial of these issues." Given the repeated attention to the issue of whether the State suppressed impeachment evidence concerning Charles Cook during the six-month period prior to the hearing, the Director had adequate and actual notice that the suppression of the September statement was within the gambit of "exculpatory materials" as the claim was articulated in the petition. Thus, the Director had actual notice that the issue was raised. *See Mongrue v. Monsanto Co.*, 2001 U.S. App. LEXIS 8485, 8 (5th Cir. 2001). Moreover, the failure of the Director to object to discussion of this issue at the hearing or object to introduction of Ex. B-4 on cross-examination of Mr. Elliott and Mr. Huff about the circumstances of the taking of the statement demonstrates the Director consented to litigating this claim. *See generally* Wright and Miller, 6A Fed. Prac. & Proc. Civ.2d 1493.

Certiorari is appropriate to review this important issue.

Claim #4
Jurists of Reason Could Easily Conclude that Mr. Banks' *Swain v. Alabama*[8] Claim Was Not Defaulted & Is Meritorious

The panel below denied Mr. Banks a COA, concluding that trial counsel's failure to timely object at trial defaulted the claim, and that while Mr. Banks had shown adequate cause to excuse the default, he failed to demonstrate prejudice. App. A at 74. It found that even though the state courts

[8]380 U.S. 202 (1965).

had found that Mr. Banks' showing of purposeful discrimination was sufficiently strong to satisfy the exceedingly demanding *Swain* standard, the fact that the State showed that no black was struck due to race foreclosed a finding of prejudice.

a. *Under Miller-El, Mr. Banks Has Made an Adequate Showing Of A Meritorious Claim and "Prejudice" to Show The Issue is Debatable Among Jurists of Reason*

We have previously set forth the *Miller-El* standard for showing an entitlement to a COA and to merits review. In *Miller-El*, the Court explained the type of showing that would establish that a Fourteenth Amendment peremptory strike claim was sufficiently debatable to warrant issuance of a COA. Mr. Banks' record evidence easily meets that standard.

At trial, the prosecution used four peremptory strikes to remove all four qualified African-American jurors. These strikes guaranteed the empaneling of an all-white jury in this mixed race case. Mr. Banks further showed that during the preceding five years, the District Attorney's office had struck over 90% of qualified black jurors while accepting more than 80% of the qualified whites in felony cases. Tr. Ex. A-01; Pet. RE Tab K; Tr. Ex. A-01, Table 2; Pet RE Tab L. Other evidence showed that the defense bar believed that Bowie County prosecutors would use their peremptory strikes to remove black jurors, and prosecutors often used race-coded jury sheets. SHTr at 58-61, 788. An expert statistician testified that there was no chance that this striking pattern occurred by chance. Tr. Ex. A-01 at 3.

While the state court erroneously refused to consider evidence from 1975 through 1978, it agreed that Mr. Banks' other evidence satisfied *Swain v. Alabama's* demanding prima facie case standard for purposeful discrimination. Pet. RE Tab D at 5. Nevertheless, because the prosecution

provided reasons for each strike at a hearing conducted thirteen years after the trial, he found that the strong prima facie case had been rebutted. *Id.*

The reasons provided by the prosecutors do not rebut this strong showing of systematic exclusion. For example, Calvin Woods, one of the four black jurors struck, was "pro-death penalty." He was struck allegedly because he answered "in a perfunctory way." SHTr. 3 at 931. However, despite claiming that he wanted to "begin a dialogue with" Calvin Woods, *id.* at 936, the prosecutor did not ask open-ended questions that would elicit narrative responses, but instead simply lectured Mr. Woods on the law. *See, e.g.*, 5SR at 1498-1500. The prosecutor's "perfunctory answers"explanation was pretextual. Joe Allen Burns, a white juror, gave similar one-word answers and was not struck. Moreover, Woods and Burns were questioned differently. For example, the first question to Burns revealed details about the violence of the murder and the fact that the victim was only sixteen, SHTr. 3 at 959, whereas Woods' first question, while similar in its general topic, *i.e.*, the crime, was worded in general, abstract language, about a human being intentionally killed during the commission of robbery. *Id.* at 934. *Miller-El* made clear that "[t]o the extent a divergence in responses can be attributed to the racially disparate mode of examination, it is relevant to our inquiry." *Miller-el v. Cockrell*, No. 01-7662 (Feb. 25, 2003).

The prosecutor later acknowledged that the historical disparity Mr. Banks established was not the result of race-neutral decision-making: "Yes, race does come in." SHTr. At 919. He also testified that this practice was so entrenched that "we took literally some razzing about placing Black jurors in criminal cases from the defense attorneys . . . [t]he first time [the District Attorney] put Blacks on a murder case, it shocked him." *Id.* at 906.

This showing, as *Miller-El* confirms, establishes that jurists of reason could find that Mr. Banks did suffer prejudice.

CONCLUSION

For the foregoing reasons, Mr. Banks respectfully prays that certiorari is granted.

DATED: February 27, 2003

Respectfully submitted,

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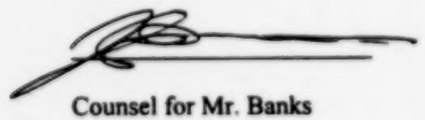

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply to Director's Opposition was furnished by overnight mail to the following attorneys on this 27th day of February, 2003:

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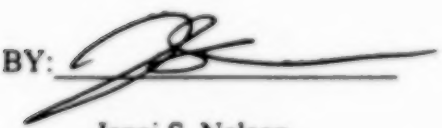
BY: 

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